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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1035

STATE OF OHIO,
on the relation of
FRANKLIN ANDERSON, *et al.*,
Petitioners,

vs.

MERCEDES COTNER,
Clerk of Cleveland City Council, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioners, Franklin Anderson and four other residents of Cleveland, Ohio, ask that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on October 6, 1967 (Appendix 14a) denying petitioners' prayer for a writ of mandamus. A motion for reconsideration was denied on October 25, 1967 (Appendix 14a).

OPINION IN THE COURT BELOW.

This was an original action initiated in the Supreme Court of Ohio. The Court's opinion is set forth in Appendix 14a. As authority for its opinion the Court cited *State, ex rel., Rhodes vs. Bd. of Elections,* 12 Ohio St. 2d 4, which was decided on October 4, 1967. The opinion in the *Rhodes* case is reprinted in Appendix 12a.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on October 25, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3). Petitioners claim their rights were violated contrary to the Equal Protection Clause of Amendment XIV of the Constitution of the United States.

QUESTION PRESENTED.

Where the City Council of a municipality has a well established practice, spanning decades, of adopting resolutions dealing with national and international affairs, does the Clerk of that Council deny these petitioners, citizens of the municipality, the Equal Protection of Laws guaranteed by Amendment XIV to the Constitution of the United States when she rejects and refuses to process an initiative petition submitted by petitioners pursuant to the municipality's charter on the grounds that the resolution contained therein deals with subject matter which the municipality is not authorized by law to control by legislative action?

CONSTITUTIONAL, STATUTORY AND CITY CHARTER PROVISIONS INVOLVED.

United States Constitution.

Amendment XIV:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution.

Article I, § 2:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Article II, § 1f:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Article XVIII, § 3:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Article XVIII, § 7:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Ohio Revised Code.

731.28. Ordinances and measures proposed by initiative petition.

Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. * * *

731.41. Charter municipal corporations.

Sections 731.28 to 731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures.

Cleveland City Charter.

Relevant sections of the Cleveland City Charter are set forth in Appendix 1a-7a.

STATEMENT OF THE CASE.

The City of Cleveland is a municipal corporation duly organized and existing pursuant to the laws of Ohio with its own Home Rule Charter. This Charter makes provision for an initiative and referendum as set forth in its chapter 7, §§ 49-62 (Appendix 2a-7a).

The petitioners are a group of duly qualified electors and residents of the City of Cleveland. Pursuant to § 49 of the Cleveland Charter, they constituted themselves a committee of petitioners for purposes of sponsoring the following initiative resolution:

Be It Resolved by the People of the City of Cleveland That:

The President of the United States Should Bring All American Troops Home From Vietnam Now So That the Vietnamese People Can Settle Their Own Affairs.

The Cleveland City Charter's initiative and referendum provisions, §§ 49 through 62 (Appendix 2a-7a), require 5,000 qualified electors of the city to sign an initiative petition. The petition is first submitted to the Clerk of Council who counts the signatures and certifies their sufficiency to City Council. Within 90 days of receipt of the petition, Council must vote on the initiative. If Council adopts the proposition submitted to it, the matter is concluded at that point. If, however, a majority of Council members vote the issue down or approve it in a form different from and unacceptable to the committee of petitioners, then the committee of petitioners may certify their intention to have the issue placed before the people of the City of Cleveland for a vote. Council is then required to put the issue on the ballot.

The Charter in § 49 speaks of ordinances as the subject matter of an initiative (Appendix 2a-3a). However, Chapter 1, § 2 of the Charter declares:

> "The enumeration of particular powers by this charter *shall not be held or deemed to be exclusive* but, in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and *may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate.*" (Emphasis added.)

Ohio Revised Code 731.28 authorizes the exercise of the initiative for ordinances "*and other measures.*" Under

this section of the Code, *resolutions* have been held to be the proper subject of an initiative petition.[1] Section 731.41 of the Code makes 731.28 inapplicable to those charter cities which have initiative and referendum provisions for "ordinances *and other legislative measures*" (emphasis added). Based upon this language and the sweep of § 2 of the Charter, the petitioners framed their initiative in the form of a resolution.

Petitioners and their supporters procured 9,954 signatures in support of their initiative resolution (Appendix 8a). On August 29, 1967, petitioners' petition containing the said signatures was duly submitted to and receipted by the Clerk of City Council (Appendix 7a-8a).

On August 31, 1967, the Clerk of Council, Mercedes Cotner, wrote petitioners and informed them that their initiative petition would not be processed "for legal reasons." (Appendix 8a-9a.)

On September 5, 1967, petitioners filed a mandamus action in the Ohio Supreme Court seeking an order requiring the clerk to count the signatures and determine their sufficiency. On October 6, 1967, the Court denied the writ.[2] Petitioners seek relief from this Court so that their initiative petition will be processed by the Clerk of Council and submitted to City Council, preparatory to a possible vote by the citizens of Cleveland. There is no issue

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[1] *James v. Ketterer*, 125 Ohio St. 165, 180 N.E. 704 (1932). The Court approved a resolution as the subject of an initiative petition. The procedure used was that set forth by state law rather than the one indicated by the initiative and referendum provisions contained in the Columbus City Charter. The Columbus Charter also spoke only of ordinances as the subject matter of an initiative but the enabling language of a broad enumeration of powers clause was *not* a factor in the case as it is here. In any event the initiators did not choose to make their effort under the Columbus Charter.

[2] Reconsideration was denied on October 25, 1967 (Appendix 14a).

of mootness under the charter with respect to the time such an election would be held since the initiative petition is not related to any specific election.

The City Council of Cleveland has a long established policy of adopting resolutions on national and international affairs. Among the numerous resolutions so adopted were five which were stipulated by counsel for petitioners and for the respondent Clerk (Appendix 9a-11a). The first of these parallels petitioners' resolution:

> Be it resolved by the Council of the City of Cleveland:
>
> That the president of the United States as commander-in-chief of the armed forces of the United States, be and he hereby is memorialized to take proper steps to insure the return of members of the armed forces to their homes and families as rapidly as is consistent with the safeguarding of the integrity and security of the United States of America; especially to insure the immediate return of said members stationed in China and other non-hostile parts of the world.

This resolution was adopted by City Council on January 21, 1946 (Appendix 9a-10a). Other resolutions deal with the affairs of countries in Eastern Europe, support for the Hungarian revolution of 1956, opposition to the abduction of Greek children in Greece, etc. All such resolutions are printed in the City Record of Cleveland at the expense of the taxpayers of the City of Cleveland. The denial of equal protection implicit in refusing to process initiative petitions in these circumstances was raised in the Supreme Court of Ohio (see Appendix 12a-14a, where the relevant sections of petitioners' pleadings, motions and briefs in the Supreme Court of Ohio are reproduced).

REASONS FOR GRANTING THE WRIT.

When a City Council uses the legislative powers conferred under the state constitution and City Charter to pass resolutions expressing its opinion on political issues outside its legislative jurisdiction, the right of citizens to initiate resolutions of the same generic kind under the initiative and referendum provisions of the constitution and charter cannot be denied without violating the Equal Protection Clause of the Fourteenth Amendment.

The Clerk of Council refused to process the petitioners' initiative petition for submission to City Council "for legal reasons" (Appendix 8a).

Article II, § 1f of the Ohio Constitution places a *floor* under the questions properly responsive to initiative by citizens of a municipality. It sets no ceiling. *State v. Hitt*, 155 Ohio St. 589, 99 N. E. 2d 659 (1951). In that case, it is said (p. 662):

> "* * * neither the Constitution of Ohio nor the statutes place any definite limitations on the use of the initiative."

In the *Hitt* case the Supreme Court of Ohio also announced the rule of construction operative in determining the breadth of the initiative power:

> "This and other courts have declared that constitutional, statutory or charter provisions for municipal initiative or referendum *shall be liberally construed in favor of the power reserved* so as to permit rather than preclude the exercise of such power, and the object clearly sought to be obtained should be promoted rather than prevented or obstructed * * *." (Emphasis supplied.) 99 N. E. 2d at 662.

Furthermore, the same decision (99 N. E. 2d p. 663) made it plain that the initiative legislative power established by the Ohio Constitution was intended to create

a power to legislate coextensive with that of the city council:

> "In adopting the initiative and referendum provisions of Section 1f, Article II of the Constitution of Ohio, it was certainly not the intention of the people to leave the voters of a municipality powerless to override legislation which might be obnoxious to them. Even though the referendum is not available because an objectionable ordinance was passed as an emergency measure, perhaps arbitrarily, the initiative always remains as an authorized remedy. *Otherwise, the people* who elect the members of council and pay their salaries *would occupy a place below the council in legislative power. Surely such was not the design and purpose of Section 1f, Article II of the Constitution.*" (Emphasis added.)

Petitioners think the propositions of the *Hitt* decision are equally apposite when applied to resolutions of council and the right of initiative. For the language of Article II, § 1f of the Ohio Constitution authorizes initiative:

> "* * * *on all questions* which such municipalities may now or hereafter be authorized by law to control by legislative action; * * *." (Emphasis added.)

"All questions" undoubtedly includes resolutions[3] because "resolutions" are specifically contemplated by the legislative procedure section of the Cleveland City Charter (see § 32, Appendix 1a-2a). Both in that section and § 33 (Appendix 2a) specific references to the adoption of resolutions are made. This, in effect, recognizes Council's right to "control by legislative action," i.e., *by resolution,* the city's view of political questions. At any rate the unchal-

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[3] In construing the Constitution of Ohio, if a power of legislation is not limited or denied, it may be said to exist. *Baker v. City of Cincinnati*, 11 Ohio St. 534, 543 (1860). Nothing in the Ohio Constitution or in the Ohio Code suggests that Council acted illegally in adopting resolutions on political questions.

lenged interpretation (in practice) by Cleveland's City Council has put this gloss upon legislative action—and council having acted as it has, the initiative power cannot now be debased to embrace less legislative power than that "control" on "all questions" which the Ohio Constitution ordains.[4] Yet, Cleveland's Clerk of Council has so limited the initiative power and, in doing so, has raised a constitutional issue of federal dimension.

If the petitioners are barred from initiating a resolution dealing with national or international affairs on the grounds that such resolution is not "subject to control by legislative action," they and other Cleveland citizens will also be precluded from testing—through the referendum—any resolution adopted by City Council dealing with similar questions. As indicated above, Cleveland's City Council traditionally passes resolutions on issues *without regard to whether it "can control by legislative action" the subject matter of such resolutions.* Under the Ohio Supreme Court's holding in the instant case, a resolution adopted by council on a controversial international issue might be odious and obnoxious to Cleveland residents yet the citizens would be powerless to rescind such resolution through the referendum. It is this dichotomy of power and the denial of Equal Protection of law attending it which animates this petition.

It is axiomatic that Equal Protection of the law requires an even handed treatment of persons operating under the same legislative or constitutional grant of power. Perhaps Ohio need not have given legislative authority to its citizens in amounts equivalent to a municipal council's

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[4] Cf. *Farley v. Healey,* S. F. 22567 (9/18/67) at p. 6. The political resolutions adopted by the Board of Supervisors of San Francisco was a decisive factor in the California Supreme Court's decision ordering the Vietnam issue on the ballot in San Francisco.

legislative power. But the Constitution of Ohio and Charter did just that. To allow a municipal official to administer access to that grant of power to effect anything less than an even hand, *Yick Wo v. Hopkins,* 118 U. S. 356 (1886) effects an invidious discrimination, which cannot be purged of its discriminatory and, therefore, unconstitutional effects by the Ohio Supreme Court's simple rubric "not subject to legislative control."

To allow the holding of the Supreme Court of Ohio to stand is to suffer a contraction of constitutional liberty at variance with a recent decision of this Court. In *Cox v. Louisiana,* 379 U. S. 536 (1965), a civil rights leader heading a peaceful demonstration was arrested and convicted under "disturbing the peace," "obstructing public passages" and "courthouse picketing" (538) statutes. The conviction of particular relevance here is the "obstructing public passages" one. The record indicated that the statute—on its face broadly precluding all street assemblies and parades except labor picketing—in practice had not been so applied. Certain meetings and parades had been permitted in the city "even though they may have the effect of obstructing traffic, provided prior approval is obtained" (p. 556). In these circumstances the conviction was overturned. The thesis of reversal is particularly relevant here:

> "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute." (pp. 557-558.)

Justice Black, concurring, developed the same constitutional proposition:

> "* * * I have no doubt about the power of Louisiana to bar all picketing on its streets and highways. * * * But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. * * * And *to deny this appellant* and his group *use of the streets* because of their views against racial discrimination, *while allowing other groups to use the streets to voice opinions on other subjects, * * * amounts, * * * to an invidious discrimination* forbidden by the Equal Protection Clause of the Fourteenth Amendment * * *." (p. 581.) (Emphasis added.)

The Clerk of Council's refusal to process the initiative petition involved here mounted precisely the same invidious discrimination condemned in *Cox*. For the effect of the refusal is to allow the city to pick and choose between the views of the council and its legislative equal—a group of citizens petitioning for initiative.

It is not necessary to decide whether council could refuse to pass resolutions and thus obliterate a comparable initiative right. The fact is it has chosen not to restrict itself thus quickening comparable rights in the initiators. The Clerk, therefore, violates the Equal Protection Clause as interpreted in *Cox v. Louisiana, id.*, when she denies citizens access to the initiated balloting contemplated by the Charter. A corollary consequence of great importance is the limiting effect on free expression.

CONCLUSION.

Arbitrary official action has been employed to discriminate invidiously between legislative equals in the exercise of legislative powers. This conduct offends the Equal Protection Clause of the Fourteenth Amendment and implicitly disregards the interpretation of that clause adopted by this Court in *Cox v. Louisiana, id.* The grant of a writ of certiorari will enable the Court to correct the discrimination, elaborate its view of the meaning and application of the Equal Protection Clause, and unblock a channel of free expression shut off by unconstitutional official action.

Respectfully submitted,

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